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TABLE OF AUTHORITIES

No. 88-1400

In The

Supreme Court of the United States

October Term, 1988

Franchise Tax Board of the State of California, *et al.*,

Petitioners,

v.

Alcan Aluminium Limited and Imperial Chemical Industries PLC,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF SHELL PETROLEUM N.V. IN SUPPORT OF RESPONDENTS

PRELIMINARY STATEMENT

Shell Petroleum N.V. ("SPNV") files this brief *amicus curiae* with the consent of all parties in order to put before the Court certain views as to (1) whether a foreign parent company of an American subsidiary has standing in federal court to challenge, under the Foreign Commerce Clause, the "up-stream" application of a state franchise tax imposed by California on the income of a "unitary business" of which the foreign parent is the head; and (2) assuming standing does exist under

such circumstances, whether a federal action for injunctive and declaratory relief is nevertheless barred by the Tax Injunction Act or the principle of comity underlying that Act.

The Seventh Circuit held below that a foreign parent company has standing in federal court to pursue an action of this type. *Alcan Aluminium Ltd. v. Franchise Tax Board* ("*Alcan*"), 860 F.2d 688, 699-700 (7th Cir. 1988). In so doing, the Seventh Circuit acknowledged an "arguable conflict", *id.* at 688 n.*, with two decisions of the Ninth Circuit denying standing to foreign parent companies to pursue such an action. *EMI Ltd. v. Bennett*, 738 F.2d 994, 996-99 (9th Cir.), *cert. denied*, 469 U.S. 1073 (1984); *Shell Petroleum N.V. v. Graves*, 709 F.2d 593, 595-96 (9th Cir.), *cert. denied, sub nom. Shell Petroleum N.V. v. Franchetti*, 464 U.S. 1012 (1983).[1] SPNV was the plaintiff in one of those Ninth Circuit actions and litigated in that action, among other things, the issue of a foreign parent company's standing to raise such a constitutional challenge under the Foreign Commerce Clause.

The *Alcan* case, like SPNV's prior action, arises in the context of the California Franchise Tax Board's (the "FTB") attempts to apply a franchise tax "upstream" from the nominal taxpayer to the combined income of that nominal taxpayer's foreign parent company and its worldwide subsidiaries and affiliates. However, unlike SPNV, the foreign parents involved here—Alcan Aluminium Ltd. ("Alcan"), a Canadian corporation, and Imperial Chemical Industries PLC ("Imperial"), a British corporation—are not companies of countries that are parties to post-war Treaties of Friendship, Commerce and Navigation ("FCN Treaties"). SPNV is a company of The Netherlands, which is a party to such an FCN Treaty. As a result, SPNV is a beneficiary of special rights and protections provided pursuant to that FCN Treaty. SPNV has asserted treaty-based claims against California's attempts to apply its

[1] The decision in *Alcan* also apparently conflicts with a ruling by the Second Circuit in *Alcan Aluminum [sic] Ltd. v. Franchise Tax Board* ("*Alcan I*"), 558 F. Supp. 624, 629 (S.D.N.Y.), *aff'd mem.*, 742 F.2d 1430 (2d Cir. 1983), *cert. denied*, 464 U.S. 1041 (1984).

unitary tax "upstream", in addition to the constitutional claims asserted by respondents here. The special rights and protections accorded SPNV and other foreign parent companies benefitting from similar FCN Treaties add an important dimension, not presented here, to the issues of standing and the application of the Tax Injunction Act.

INTEREST OF AMICUS CURIAE

SPNV is a company of The Netherlands and as such is accorded special rights and protections by the Treaty of Friendship, Commerce and Navigation of 1956 between the United States and The Netherlands, as well as general principles of international law. SPNV is also accorded certain rights and protections under the United States Constitution, both directly and by virtue of the "national treatment" guarantees of the FCN Treaty. These rights and protections may be affected by the decision herein.

SPNV has its principal place of business at The Hague. Sixty percent of the equity shareholding in SPNV is held by the Royal Dutch Petroleum Company, a company incorporated in The Netherlands ("Royal Dutch"). The remaining 40 percent is held by The "Shell" Transport and Trading Company PLC, a company incorporated in England ("Shell Transport").

SPNV and an affiliated company, The Shell Petroleum Company Limited, together hold, directly or indirectly, investments representing interests in over 900 other Royal Dutch/Shell companies operating in over 100 countries. Included among SPNV's holdings at the present time is an interest in Shell Petroleum Inc., which in turn holds all the outstanding shares of Shell Oil Company ("Shell Oil"). The majority of the remaining interest in Shell Petroleum Inc. is held by SPNV's parent, Royal Dutch, with the rest held directly by Shell Transport. Shell Oil has engaged in business in California and has been subject to the California corporate franchise tax. For at least some tax years (including a number of years during which SPNV directly held approximately 69% of the outstanding shares of Shell Oil), the FTB has attempted

to apply its unitary tax formula "upstream" so as effectively to tax not only the income of Shell Oil, but also the income of its foreign parent, SPNV, and all of SPNV's subsidiaries and affiliates worldwide. Those attempts were the subject of SPNV's prior litigation against the FTB.

As a foreign parent company that has litigated against California's attempts to combine, apportion and tax its income together with that of its worldwide affiliates and subsidiaries, SPNV has a special interest in the issues presented by the present case. Because SPNV is a foreign parent company entitled to rights and protections under the United States-Netherlands FCN Treaty and international law, as well as the Constitution, SPNV believes that it can present views not heretofore expressed which may be of use to the Court in resolving the issues presented.

SPNV submits this brief *amicus curiae* to support the position taken in this litigation by the respondents and to place before the Court the distinctive considerations applicable to a foreign parent company protected by the principles of strict territoriality of taxation embodied in various FCN Treaties and international law.

SUMMARY OF ARGUMENT

A foreign parent company of an American subsidiary has standing in federal court to challenge, under the Foreign Commerce Clause and the Due Process Clause of the Constitution, the attempted imposition of a state "unitary business" tax on the combined and apportioned income of that foreign parent and its worldwide subsidiaries and affiliates. The constitutional and prudential requirements of standing are satisfied by the direct injury of double taxation the foreign parent suffers independently of the injury suffered by the subsidiary due to any unfairness of the unitary tax formula.

The risk of double taxation falls more heavily on a foreign holding company parent that chooses as its instrumentality of foreign commerce a corporate subsidiary subject to the

"upstream" application of a unitary tax than it does on a domestic holding company parent making the same choice. This potential of a unitary tax to burden more heavily a foreign parent in its choice of its instrumentality of foreign commerce than a domestic parent making the same choice renders the "upstream" application of a unitary tax formula to a foreign parent unconstitutional under the Foreign Commerce Clause and the Due Process Clause of the Constitution. The foreign parent company has standing to raise that constitutional claim because it bears the added burden.

This double taxation injury is not mitigated by factors, such as those relating to "economies of scale", cited by this Court in its decision upholding the "downstream" application of the California unitary tax to an American parent company with foreign subsidiaries. *Container Corp. of America v. Franchise Tax Board,* 463 U.S. 159, 181 (1983) (quoting *Mobil Oil Corp. v. Commissioner of Taxes,* 445 U.S. 425, 438 (1980)). Nor do the factors used by the Court to distinguish the facts in *Container* from those in *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434 (1979) (holding unconstitutional under the Commerce Clause California's application of an apportioned value added property tax to Japanese shipping containers subject to full taxation in Japan), apply with equal weight under the present circumstances.

A finding of standing as to at least some foreign parent companies is further mandated by the existence of Treaties of Friendship, Commerce and Navigation according those foreign parents special rights and protections regarding the manner in which they and their domestic subsidiaries are treated by the United States and state and local authorities. Those rights and protections do not vest in the domestic subsidiaries and those subsidiaries are without standing to prosecute the foreign parents' claims pursuant to such FCN Treaties.

The need for federal uniformity regarding taxation of instrumentalities of foreign commerce also supports a finding of standing. Article I, § 8, cl. 3 of the United States Constitution vests the federal government with the power to regulate foreign commerce. The Court has recognized that the federal govern-

ment's need to speak with one voice concerning matters of foreign commerce contributes to the heightened level of scrutiny necessary when analyzing the international application of a unitary tax. *Container*, 463 U.S. at 186; *Japan Line*, 441 U.S. at 448-51. The prudential concerns regarding standing should not act as a bar to the swift resolution of this important matter, which is preventing the federal government from assuring uniformity in an aspect of foreign commerce of great concern to many of its trading partners.

Finally, neither the Tax Injunction Act (28 U.S.C. § 1341) nor the principle of comity underlying that Act is a bar to suit for injunctive or declaratory relief in federal court by a foreign parent company. The Tax Injunction Act only bars suit in federal court by a party having a "plain, speedy and efficient remedy" in state court. California does not provide a remedy of any type to the foreign parent of an American subsidiary subject to "upstream" application of its unitary tax formula. Therefore, by its express terms, the Tax Injunction Act does not apply. The principle of comity underlying the Act should not serve to deny a foreign parent company the only forum in which it may seek redress for its double taxation injury.

ARGUMENT

I. The California Franchise Tax as Applied Violates the United States Constitution and Foreign Parents Have Standing in Federal Court to Challenge Such Application.

This case on the merits involves an issue not previously addressed by this Court: the constitutionality, under the Foreign Commerce Clause, of the "upstream" application of a state's unitary tax formula to the combined income of the nominal taxpayer, its foreign parent company and the worldwide subsidiaries and affiliates of that foreign parent.[2] The result of that "upstream" application is to include in the income subject to apportionment and taxation income which in no sense, legally or practically, belongs to the nominal taxpayer. In the cases in which the Court has previously addressed the

[2] This issue was specifically reserved by the Court in *Container*, 463 U.S. at 189 n.26, 195 n.32.

constitutionality of a unitary tax method, the parent company was both the nominal taxpayer and the litigant, and the state's unitary tax method was applied "downstream", combining and apportioning the corporate parent taxpayer's income with the income of its subsidiaries and affiliates not otherwise subject to taxation by that state.[3] The "upstream" application of a unitary tax method so as to reach across national boundaries and impose upon a foreign parent company a system of taxation at odds with the arm's-length method adopted by the United States and every other significant trading nation presents difficult issues not fully addressed by the Court's analysis of "downstream" international application of a unitary tax formula in *Container*, *see* pp. 19-23 *infra*. Moreover, the interests of international trading partners in protecting their nationals from this departure from the international norm and the consequent risk of retaliation are far stronger when a unitary tax method is applied "upstream" to a foreign parent, as in the present circumstances, than when it is applied "downstream" from an American parent to a foreign subsidiary, as in *Container*. *See* pp. 18-19 *infra*. *See also Container*, 463 U.S. at 195 n.32.

It is in this novel context that the Court must address the issue raised by petitioners: whether a foreign parent should have standing in federal court to seek redress for the direct injury inflicted upon it by the "upstream" application of a unitary tax formula.

A. Double Taxation, a Principal Constitutional Danger Accompanying a Unitary Tax, Is an Injury Imposed upon the Parent Company, Not the Subsidiaries.

A principal constitutional danger arising out of the application of a unitary tax formula is the risk of double taxation (assuming there is evidence of such double taxation). *See, e.g.*, *Container*, 463 U.S. at 169, 170-71; *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207, 228-29 (1980); *Mobil*, 445 U.S.

[3] *See, e.g.*, *Container*, 463 U.S. at 173-74; *ASARCO Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 313 (1982); *F.W. Woolworth Co. v. Taxation & Revenue Dep't*, 458 U.S. 354, 357-59 (1982).

443-45; *cf. Japan Line,* 441 U.S. at 451-52 (discussing the danger of double taxation in the context of an internationally applied and apportioned value added property tax). It was this risk that led Justice Powell to state in his dissenting opinion in *Container:*

> "The principles enunciated in [*Japan Line*] should be controlling here: a state tax is unconstitutional if it either 'creates a substantial risk of international multiple taxation' or 'prevents the Federal Government from "speaking with one voice when regulating commercial relations with foreign governments."'" 463 U.S. at 198 (quoting *Japan Line,* 441 U.S. at 451).

Double taxation is an injury that a unitary tax formula imposes on the *parent.* It is not an injury that is suffered by the subsidiary. The subsidiary is taxed but once—in the present case, by California. The subsidiary may well be separately injured by being taxed on more income than is properly attributable to it, but that injury is not *double* taxation of the subsidiary.[4] Rather, the double taxation arises from the fact that the same income—income belonging to the parent company—has been taxed by more than one jurisdiction, under the guise of taxing separate subsidiaries. This can be shown by a simplified example: Foreign Subsidiary A has "its" income, as measured by the internationally accepted arm's-length method, taxed by its host country; Domestic Subsidiary B has "its" income, as measured by an "upstream" unitary business apportionment formula, taxed by California; as alleged by respondents, because of the differences in methodology, California has included some of Foreign Subsidiary A's income, as defined by its host country, into the definition of Domestic Subsidiary B's income. Accordingly, that income has been taxed twice, even though Foreign Subsidiary A and Domestic Subsidiary B have each only been taxed once. The direct injury of that double taxation is logically imposed on the parent; it has paid tax through both subsidiaries on a single piece of income.[5]

1. The General Rule Denying Shareholders Standing to Sue Regarding Corporate Injuries Does Not Act as a Bar to Standing for a Parent Company to Seek Redress for its Double Taxation Injury.

A suit brought by a foreign parent company seeking relief from the injury caused by double taxation cannot properly be described as belonging to the class of "shareholder suits to redress injuries to their corporations". *Alcan,* 860 F.2d at 693. It is true that it is the parent company's status as the majority or

[4] Petitioners repeatedly assert that the Seventh Circuit rejected the argument that double taxation results in a direct and independent injury to a foreign parent company. FTB Brief at 14, 26, 36. As the decision of the Seventh Circuit makes clear, that assertion is incorrect. The Seventh Circuit did state that double taxation "*narrowly construed*" may be viewed as increased overhead that only inflicts injury on a foreign parent in its capacity as a shareholder. *Alcan,* 860 F.2d at 696 (emphasis supplied). But the Seventh Circuit rejected this narrow construction, stating:

> "However, the arguments that Alcan and Imperial incur no direct and independent injury from costs plausibly viewed as burdens on their subsidiaries remains persuasive only so long as the relationship between parents and subsidiaries is viewed narrowly, focusing exclusively on the parents' status as shareholders. . . . This line of argument, however, ignores a second important feature of the relationship between the foreign parents and their domestic subsidiaries: the subsidiaries are owned as instrumentalities of the foreign commerce of their parents." *Id.* at 697.

The Seventh Circuit found that the potential for a unitary tax formula to doubly tax the income of a foreign parent impermissibly burdens a foreign parent's choice of the manner in which it conducts its foreign commerce in a way that a domestic parent is not similarly burdened. This analysis of *the effect of double taxation on a foreign parent* led the Seventh Circuit to hold that "Alcan's and Imperial's injuries are direct and independent of the injury to their subsidiaries and standing should follow." *Id.*

[5] The domestic subsidiary presumably has a claim that it has have been *unfairly* taxed because of the improper inclusion of income to which it has no entitlement, but that is a different injury from *double* taxation, which is inflicted upon the parent company.

sole shareholder in a subsidiary subject to an "upstream" unitary tax that makes it possible for the parent to suffer the injury of double taxation. However, this does not transform the injury of double taxation into an injury suffered by the subsidiary.

If the double taxation injury were merely derivative of shareholder *status*, as petitioners suggest, FTB Brief at 35, one would expect all parties sharing that status to suffer similar injuries. Plainly this does not occur. Only one shareholder may own the greater than fifty percent share of the subsidiary giving it the controlling ownership necessary for California to deem the shareholder and subsidiary a "unitary business" and apply its unitary tax formula "upstream" to that shareholder's income. *Appeal of Douglas Furniture of California, Inc.*, [1981-1984 Cal. Transfer Binder] St. Tax Rep. (CCH) ¶ 400-646 (SBE January 31, 1984). Therefore, only one shareholder can suffer the double taxation injury. This double taxation injury clearly falls into petitioners' second category of exceptions to the rule denying standing to shareholders: that "where the stockholder suffers an injury separate and distinct from any injury suffered by other stockholders or the corporation itself". FTB Brief at 23 (citation omitted). *See also Cowin v. Bresler*, 741 F.2d 410, 415-16 (D.C. Cir. 1984).

With the exception of a case involving special First Amendment issues not applicable here, in every case cited by the Seventh Circuit or petitioners as an example of the rule barring standing to shareholders of a corporation the shareholder involved was seeking either to redress an injury suffered by the corporation or to substitute its judgment for that of the corporation.[6] No case cited by the Seventh Circuit or by

[6] *E.g., Corbus v. Alaska Treadwell Gold Mining Co.*, 187 U.S. 455, 463-65 (1903) (denying a shareholder standing "to coerce the directors of a corporation to an act which their judgment does not approve, or to substitute his judgment for theirs"); *Hawes v. City of Oakland*, 104 U.S. 450, 452-53, 462 (1881) (barring shareholder standing to pursue a corporate cause of action and invoke diversity jurisdiction when the corporation itself could not); *Gregory v. Mitchell*, 634 F.2d 199, 202 (5th Cir. 1981) (preventing controlling share-

petitioners involves the denial of standing to a shareholder to seek redress for a legal injury which, though connected to the shareholder's status as such, could not logically be suffered by the corporate entity.[7]

That a foreign parent company has standing should not be surprising, since in any "upstream" application of the unitary tax, the taxing authority is in effect substituting the parent for the subsidiary as the business unit subject to taxation. In other words, the taxing authority has already decided to disregard corporate structure in its definition of the unitary business, going so far as to include in the income base subject to apportionment income as to which the nominal taxpayer (the subsidiary) has absolutely no legal entitlement. Having made the choice to treat the unitary business as a single entity, of which the parent company is necessarily the owner and proprietor, it is unfair for the taxing authority to then hide behind formal corporate structure to call the subsidiary the taxpayer for standing purposes. The parent company should have standing

holders in a bank from suing as individuals under 42 U.S.C. § 1983 for alleged discriminatory treatment of the bank by state regulators); *Erlich v. Glasner*, 418 F.2d 226, 228 (9th Cir. 1969) (denying shareholder standing to sue under the Civil Rights Act for damages suffered by the corporation); *Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429, 439-41 (9th Cir. 1979) (sole shareholder in automobile dealership cannot sue in individual capacity for claims arising under Automobile Franchise Act, antitrust laws or pendent state claims for damages to the corporation); *Von Brimer v. Whirlpool Corp.*, 536 F.2d 838, 846-47 (9th Cir. 1976) (majority shareholder barred from suing for interference with corporation's contractual relations).

[7] Petitioners argue that it is "self-evident" that the only party that may be directly injured by the application of a unitary tax formula is the party against which the tax is nominally assessed. FTB Brief at 35. The FTB is mistaken in its implicit assumption that application of a unitary tax formula can only result in one form of direct injury. This Court has already acknowledged that international application of a unitary tax may result in at least two forms of injury: (1) unfair apportionment of income, and (2) discrimination against foreign commerce resulting from double taxation. *Container*, 463 U.S. at 170-71. The former injury is suffered by the nominal taxpayer, but the latter is always suffered by the parent company, which in an "upstream" combination is *not* the nominal taxpayer.

to challenge the "upstream" application of the unitary tax, just as the parent company clearly has standing to challenge "downstream" applications in which it is both the nominal taxpayer and the entity suffering the double taxation injury.[8]

2. The Direct Injury of Double Taxation Suffered by a Foreign Parent as a Consequence of the "Upstream" Application of a Unitary Tax Satisfies Both the Constitutional and the Prudential Requirements of Standing.

As the party that suffers the injury of double taxation, the foreign parent company is best situated to prosecute before a federal court a constitutional challenge (including one based upon the Foreign Commerce Clause) to a state's unitary tax scheme. As this Court made clear in *Warth v. Seldin*, 422 U.S. 490 (1975), "[t]he Art. III judicial power exists only to redress or otherwise to protect against *injury to the complaining party*, even though the court's judgment may benefit others collaterally." *Id.* at 499 (emphasis supplied). Just as the constitutional element of standing analysis requires that the injury

[8] The inapplicability in the present case of the general rule that shareholders lack standing to redress the injuries of their corporation can be demonstrated by a hypothetical example: Foreign Parent A owns a majority interest in Domestic Subsidiary B, but is not the sole shareholder; Foreign Parent A also owns other subsidiaries; Domestic Subsidiary B in turn has subsidiaries of its own; and only Domestic Subsidiary B does business in California. If California defines the "unitary business" subject to taxation as Domestic Subsidiary B and *its* subsidiaries—a "downstream" application—so that only the income of B and its subsidiaries is combined, apportioned and taxed, then Foreign Parent A does *not* have standing; the parent company in that example is in the same position as the other shareholders of Domestic Subsidiary B. However, if California defines the "unitary business" as including not only Domestic Subsidiary B and its subsidiaries but also Foreign Parent A and its subsidiaries—an "upstream" application from the nominal taxpayer to its parent—so that the income of A and its subsidiaries is combined, apportioned and taxed along with that of B and its subsidiaries, then Foreign Parent A *does* have standing; it stands in a quite different position from the other shareholders of Domestic Subsidiary B.

complained of be "to the complaining party", the prudential aspect of standing analysis requires "that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties". *Id.* (citations omitted). Where the injury complained of is *double* taxation, the foreign parent company is in the best position to place the issues involved before a court. Indeed, logically *only* the parent can satisfy both prongs of the *Warth* standing analysis for a double taxation claim; the subsidiary has standing to complain that it is *unfairly* taxed, but is not the party best situated to assert that its parent is *doubly* taxed.

Petitioners' statement that "the standing question essentially is whether the parent companies may challenge the constitutionality of tax assessments issued against taxpayer-subsidiaries which are perfectly capable of pursuing the *same* constitutional claims", FTB Brief at 34 (emphasis supplied), ignores the fact that respondents are seeking standing to prosecute constitutional claims *not* shared with their taxpayer subsidiaries. Foreign parents such as respondents are not seeking "to litigate their subsidiaries' tax liability". *Id.* at 35. They seek to prosecute their own claims arising out of the double taxation they suffer as a result of petitioners' "upstream" application of the California unitary tax. To require a foreign parent, which has suffered constitutionally impermissible double taxation injuries that logically are not suffered by its American subsidiary, to prosecute those constitutional claims through that very subsidiary, as petitioners suggest, *id.* at 42-43, would turn standing doctrine on its head.[9]

[9] Petitioners go so far as to state:

> "It also follows that the taxpayer-subsidiaries *would be able to argue in the state courts that the alleged burdens imposed on their foreign parents* are of such a nature as to interfere with the congressional power to regulate foreign commerce." *Id.* at 48 (emphasis supplied).

This Court's reasoning in *Warth*, 422 U.S. at 499, makes clear that foreign parents should litigate directly the unconstitutionality of the burdens placed upon them.

B. The "Upstream" Application of a Unitary Tax Imposes Upon a Foreign Parent a Greater Risk of Unremedied Double Taxation Than Is Imposed Upon a Domestic Parent.

There is a distinct difference between a foreign parent company and a domestic parent company in the present context which further supports standing for the foreign parent company. The injury suffered by a foreign parent as a result of double taxation cannot be viewed merely as an increased cost of doing business through a subsidiary, a cost falling equally on both domestic and foreign parents choosing to do business in such a manner. As this Court's analysis in both *Container* and *Japan Line* concedes, international application of a unitary or apportioned tax carries with it an "enhanced risk of multiple taxation". *Container,* 463 U.S. at 185; *Japan Line,* 441 U.S. at 447-48. This "enhanced risk" of double taxation in the international context is primarily a result of " 'the absence of an authoritative tribunal capable of ensuring that the aggregation of taxes is computed on no more than one full value . . . .' " *Container,* 463 U.S. at 185-86 (quoting *Japan Line,* 441 U.S. at 447-48). [10]

Like a foreign parent company, a domestic parent with foreign subsidiaries lacks a single authoritative tribunal before which it may resolve all instances of double taxation. However, because a domestic parent company by definition is a taxpayer within the United States, it always has the opportunity to come before the Supreme Court seeking redress for any double taxation resulting from the direct taxation of its income and the indirect taxation of a portion of that income through a subsidiary. *See, e.g., Container,* 463 U.S. at 163; *see Japan Line,* 441 U.S. at 447.[11] A foreign parent company, if denied standing, lacks even that partial remedy for any double taxation (assuming—as is the case for SPNV—that it does no direct business in the United States). It is this disparity in the risk of injury through *unremedied* double taxation that impermissibly burdens the foreign parent's choice to use a domestic subsidiary as its instrumentality of foreign commerce, violating both the Foreign Commerce Clause and the Due Process Clause of the Constitution.

[10] In addition, the degree of double taxation itself is greater in the context of an "upstream" application of a unitary tax formula to a foreign parent than in the context of either a "downstream" international application to a domestic parent or a purely domestic application. *See* pp. 19-23 & n.19 *infra.*

[11] Petitioners' suggestion that the Seventh Circuit's ruling grants foreign parents a remedy unavailable to American parents, FTB Brief at 36, is incorrect.

Put another way, the foreign parent company must make a choice. It can conduct business directly in California, thereby running the substantial risk of international double taxation but at least giving itself access to American courts, as the nominal taxpayer, to challenge that double taxation of its income. Alternatively, it can conduct business in California through a domestic subsidiary, thereby running the same substantial risk of international double taxation, but—under petitioners' theory—being denied access to all American courts to challenge that double taxation and instead being left only with its subsidiary's general fairness challenge to the California tax. Or it can stay out of California altogether, acting only at arm's length with unrelated companies, in which case there is no danger of international double taxation.[12] To force a foreign parent company to make the choice outlined above—to compound the danger of international double taxation by the very act of denying the foreign parent standing to prove that double taxation—places an added burden on international commerce that a domestic parent does not have to face, because a domestic parent will always have standing, as the nominal taxpayer, in some American court.

[12] Petitioners recognize the choices faced by a foreign parent company, FTB Brief at 26-30 & nn.8 & 9, but fail to acknowledge the gravity of their implications. Petitioners attempt to discredit the Seventh Circuit's holding by stating that its reasoning comes to no more than a conclusion that foreign parent companies "suffer a cognizable injury simply because they are put to a choice and may *prefer* to do business in a different form". FTB Brief at 31 (emphasis in original). As the Seventh Circuit makes clear, it is the "potential for the unitary tax to *penalize* foreign ownership of American assets [that] distinguishes the unitary tax from . . . regulation that might cause comparable increases in the cost of doing business in California, but would presumably affect foreign and domestically owned operations fairly equally", thereby unconstitutionally burdening a foreign parent. *Alcan,* 860 F.2d at 697 (emphasis supplied).

In short, the combination of "upstream" application of the unitary tax and denial of standing to the foreign parent to challenge that application doubly punishes the foreign parent for its choice of a domestic subsidiary as the instrumentality of foreign commerce. The effect, if standing is denied in the present situation, is international double taxation for which there is no effective remedy in an American court for the entity that actually suffers the double taxation injury.

C. Benefits Accorded Certain Foreign Parent Companies Pursuant to Treaties of Friendship, Commerce and Navigation Provide an Additional Basis for Holding That Such Parents Have Standing in Federal Court to Challenge the "Upstream" Application of a Unitary Tax Formula.

Following the conclusion of World War II, the United States entered into a series of Treaties of Friendship, Commerce and Navigation, one purpose of which was "to give corporations of each signatory legal status in the territory of the other party, and to allow them to conduct business in the other country on a comparable basis with domestic firms". *Sumitomo Shoji America, Inc. v. Avagliano,* 457 U.S. 176, 185-86 (1982). SPNV is accorded special rights and protections pursuant to one such Treaty, signed by the United States and The Netherlands in 1956, and has previously argued to this Court that these rights include certain substantive rights to Netherlands parent companies concerning how they and their domestic subsidiaries—their "property, enterprises and other interests", Article I, ¶ 1—are treated by the United States and state and local authorities. Petition for a Writ of Certiorari, *Shell Petroleum N.V. v. Franchetti,* No. 83-586, at 13-18.[13] In

[13] As noted above, there are no treaty claims in the present case. Neither Canada nor the United Kingdom is a party to a post-war Treaty of Friendship, Commerce and Navigation with the United States. Instead, both are beneficiaries of a Treaty of Amity, Commerce and Navigation of 1794 between the United States and Great Britain. This and other early commercial treaties negotiated by the United States were "primarily concerned with the trade and shipping rights of individuals" and became "outmoded" "as corporate involvement in international trade expanded in this century". *Sumitomo,* 457 U.S. at 186 & n.14.

particular, SPNV has contended that Article XI, ¶ 4 of the United States-Netherlands FCN Treaty adopts the internationally accepted method of arm's-length accounting and prohibits the use of "upstream" unitary tax methods on a Netherlands parent and its American subsidiaries. *Id.* at 15-18.[14] Numerous other FCN Treaties have comparable provisions.

If that treaty interpretation is correct—and numerous foreign governments have supported SPNV as amici in that view[15]—then a foreign parent should have standing to assert violations of its substantive treaty rights. *See generally* Note, *Standing Under Commercial Treaties: Foreign Holding Companies and the Unitary Tax,* 97 Harv. L. Rev. 1894 (1984). This standing argument is strengthened by the fact that most, though perhaps not all, American subsidiaries of foreign parents accorded rights pursuant to FCN Treaties lack standing to prosecute claims pursuant to those treaties in federal court. *Sumitomo,* 457 U.S. at 182-83, 185 n.12.

The Ninth Circuit has disagreed with SPNV's treaty interpretation, at least with regard to the standing issue, and has held that the rights granted to foreign corporations pursuant to FCN Treaties are limited to the right " 'to conduct business in [the United States] on a comparable basis with domestic firms' ". *Shell Petroleum N.V. v. Graves,* 709 F.2d at 596 (quoting *Sumitomo,* 457 U.S. at 185-86). However, even if this limitation is correct—and SPNV submits, and the Netherlands government has agreed,[16] that it is not—the right as

[14] Excerpts from the United States-Netherlands FCN Treaty, 8 U.S.T. 2043, T.I.A.S. No. 3942, are reprinted in the appendix to this brief.

[15] *See* Motion for Leave to File Brief and Brief of the Governments of Belgium, Denmark, France, The Federal Republic of Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, and the United Kingdom (the Member States of the European Communities) as Amici Curiae, filed November 10, 1983, *Shell Petroleum N.V. v. Franchetti,* No. 83-586.

[16] *See* Brief of the Government of the Kingdom of The Netherlands as Amicus Curiae, filed October 17, 1983, *Shell Petroleum N.V. v. Franchetti,* No. 83-586.

defined by the Ninth Circuit would be violated by the denial of standing to a foreign holding company parent (such as SPNV) to pursue the type of partial remedy available to a domestic holding company parent suffering a double taxation injury arising out of the "upstream" application of a unitary tax method. *See* pp. 14-16 *supra*.

As noted above, respondents here do not assert a claim under a post-war FCN Treaty, and therefore they cannot claim standing pursuant to such a treaty. SPNV raises the issue here simply to apprise the Court of this additional basis for standing which will be available to many foreign parent companies. Resolution of the issue of standing to raise exclusively constitutional claims, even if that issue is resolved contrary to respondents, should not foreclose the possibility that a foreign parent company has standing to raise treaty claims, including national treatment claims that incorporate constitutional analyses of the double taxation problem.

D. The Need for Federal Uniformity Regarding Taxation of Instrumentalities of Foreign Commerce Also Supports a Finding of Standing.

Article I, § 8, cl. 3 of the United States Constitution vests in the federal government the power to regulate foreign commerce. In both *Container*, 463 U.S. at 186, and *Japan Line*, 441 U.S. at 448-51, this Court has recognized that the federal government's need to speak with one voice concerning matters of foreign commerce contributes to the heightened level of scrutiny necessary when analyzing the international application of an apportioned tax.

The United States and every other significant trading nation in the world tax foreign corporations doing business within their territorial jurisdictions through a local subsidiary by treating the local subsidiary as an independent entity, determining the subsidiary's income on the basis of its separate accounts and looking to the foreign parent's accounts only when necessary to adjust transactions between parent and subsidiary to arm's-length values. *See generally Container*, 463 U.S. at 184-85; *id.* at 198 (Powell, J., dissenting). This approach,

commonly referred to as the arm's-length method, has not only been universally followed, but has also been adopted in numerous bilateral treaties, including post-war FCN Treaties. Petitioners' "upstream" application of a formula apportioned income tax to the combined income of a foreign parent company and its worldwide subsidiaries is in sharp conflict with this internationally accepted norm.

The need for federal uniformity in conducting foreign affairs is particularly apparent when differing state and federal policies toward foreign countries prompt international protest, creating the potential for retaliation against the nation as a whole, not just against the state posing the conflict. *Japan Line*, 441 U.S. at 450. Such a threat of retaliation is particularly pronounced where, as here, state officials are acting against a foreign parent company, because the interest of a foreign government in protecting the legitimate rights of its nationals is strongest in such a case. The burden California's "upstream" unitary tax imposes on foreign parent companies greatly offends other nations and threatens to elicit retaliatory measures. *See* Brief Amicus Curiae of the United States, dated March 6, 1986, filed before the District Court in *Alcan*, at 23. Purely prudential concerns regarding standing should not act as a bar to the swift resolution of this important matter, which is preventing the federal government from assuring uniformity in an aspect of foreign commerce of great concern to many of its trading partners.

E. The Application of a Unitary Tax "Upstream" to a Foreign Parent Presents Special Problems Not Previously Addressed by the Court in Its Review of "Downstream" Applications of a Unitary Tax, And Those Problems Further Support a Finding of Standing.

In a line of cases reaching back to the early part of this century, this Court has progressively reviewed various aspects of the application of unitary tax methods and drawn boundaries between those that can survive constitutional challenge and

those that cannot.[17] In *Container*, the Court specifically addressed the international application of a unitary tax formula. While the Court upheld the "downstream" international application of the California unitary tax in *Container*, the same analysis, applied in the "upstream" international context, indicates that double taxation occurs to a greater degree in the "upstream" context.[18]

In *Container*, the domestic parent taxpayer attacked California's three factor (payroll, property and sales) apportionment formula on the related grounds that the formula, by ignoring the greater profitability of foreign subsidiaries, distorts the true allocation of income and that greater domestic costs of production unfairly inflate the ratio of income apportioned to the domestic operations. This Court responded by stating that

[17] *See, e.g., Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159 (1983) (upholding the constitutionality of the California unitary tax as applied "downstream" to a Delaware parent with foreign subsidiaries); *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207 (1980) (holding that the Due Process Clause of the Fourteenth Amendment and the Commerce Clause do not bar the application of the Wisconsin unitary tax to a Delaware corporation doing business in Wisconsin); *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980) (holding that the Due Process Clause and the Commerce Clause do not bar the inclusion of "foreign source" dividend income in the taxable income subject to the Vermont unitary tax). *See also Shell Oil Co. v. Iowa Dep't of Revenue*, 109 S. Ct. 278 (1988); *ASARCO Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307 (1982); *F.W. Woolworth Co. v. Taxation & Revenue Dep't*, 458 U.S. 354 (1982); *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978); *General Motors Corp. v. Washington*, 377 U.S. 436 (1964); *Butler Bros. v. McColgan*, 315 U.S. 501 (1942); *Bass, Ratcliff & Gretton, Ltd. v. State Tax Comm'n*, 266 U.S. 271 (1924); *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113 (1920).

[18] Petitioners allege that the Seventh Circuit improperly considered the merits of respondents' claims in deciding the standing issue. FTB Brief at 33-34. The Seventh Circuit clearly left consideration of the merits to the district court. *Alcan*, 860 F.2d at 697 n.10. The Seventh Circuit's statement that "the potential for constitutionally significant offense is sufficient to create standing" is entirely within the bounds of this Court's statement that standing "often turns on the nature and source of the claim asserted". *Warth*, 422 U.S. at 500.

the proposed alternative (arm's-length accounting) " 'may fail to account for contributions to [the foreign subsidiaries'] income resulting from functional integration, centralization of management, and economies of scale' ". 463 U.S. at 181 (quoting *Mobil*, 445 U.S. at 438). The assumption underlying the Court's "economies of scale" analysis is that a parent company performs certain functions on behalf of its subsidiaries because the cost of those functions to the parent is less than it would be to the subsidiaries. This relieves the subsidiaries of at least some of the costs associated with those functions, thereby increasing their profitability. Thus, the parent's contribution to the subsidiaries' profitability is presented as a justification for attributing a portion of the subsidiaries' income to the parent.

However, arguments such as "economies of scale" cannot be used to mitigate the risk of double taxation when a unitary tax formula is applied "upstream" from an American subsidiary to a foreign parent. Any economies achieved by such integration or centralization should already be reflected as an increase in the income of the American subsidiary and therefore cannot be used as a justification for capturing some portion of the foreign parent's income and attributing it to the subsidiary. It was the recognition of the greater problem presented by "upstream" international application of a unitary tax that prompted Justice Powell to state in his *Container* dissent:

> "The Court's argument is even more difficult to accept when one considers the dilemma it creates for cases involving foreign corporations. *If California attempts to tax the American subsidiary of an overseas company on the basis of the parent's worldwide income, with the result that double taxation occurs, I see no acceptable solution to the problem created. Most of the Court's analysis is inapplicable to such a case.* There can be little doubt that the parent's government would be offended by the State's action and that international disputes, or even retaliation against American corporations, might be expected. *It thus seems inevitable that the tax would have to be found unconstitutional at least to the extent it is applied to foreign companies.*" 463 U.S. at 202-03 (emphasis supplied; footnote omitted).

In addition, the three factors used by the Court in *Container* to distinguish *Japan Line* carry less weight when a unitary tax formula is being applied "upstream" to a foreign parent. In *Japan Line*, this Court held that California's application of an apportioned value added property tax to Japanese shipping containers subject to full taxation in Japan was unconstitutional under the Commerce Clause. 441 U.S. at 453-54. In *Container*, the Court conceded that "[t]he case most relevant to [its] inquiry" regarding "the additional scrutiny required by the Foreign Commerce Clause" when applying a unitary tax to an international enterprise (in that case headed by a domestic parent) is *Japan Line*, 463 U.S. at 185.

In distinguishing *Japan Line* and holding that "downstream" international application of a unitary tax is not barred by the Foreign Commerce Clause, the Court relied upon three factors. *Id.* at 187-89. The first, that *Japan Line* involves a tax on property rather than income, applies in the instant case but is by no means dispositive, just as it was not dispositive in *Container*. The second, that "the double taxation in this case, although real, is not the 'inevitabl[e]' result of the California taxing scheme", *id.* at 188, carries significantly less weight when (as here) a unitary tax is being applied "upstream", because the factors mitigating double taxation in the "downstream" context are not present. *See* pp. 19-21 *supra; see also Container*, 463 U.S. at 202-03 (Powell, J., dissenting).[19] Finally, the third factor, that "the tax here falls, not on the foreign owners of an instrumentality of foreign commerce, but on a corporation domiciled and headquartered in the United States", 463 U.S. at 188, is clearly inapplicable in the present context.

The "upstream" application of a unitary tax formula imposes a substantial risk of unremedied double taxation on a foreign parent choosing a corporate subsidiary as its instrument of foreign commerce that is significantly greater than the risk faced by an American parent making the same choice. This direct and increased injury of double taxation impermissibly burdens a foreign parent's choice of the manner in which it participates in foreign commerce. The independent and direct nature of that injury to the foreign parent company should be more than sufficient to grant that foreign parent standing to challenge an "upstream" unitary tax formula pursuant to the Foreign Commerce Clause.

[19] The increased risk of double taxation is underscored by the fact that "the taxing authorities of the United Kingdom consider the California [unitary] taxes to be partially measured by income not having a source in California" and therefore do not permit full credit for California taxes as "foreign taxes paid on earnings which are the source of dividends paid to a U.K. company". FTB Brief at 38.

II. Neither the Tax Injunction Act Nor the Principle of Comity Underlying It Bars Suit in Federal Court by a Foreign Parent.

The Tax Injunction Act of 1937, 28 U.S.C. § 1341, provides:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

Since a foreign parent company has no "plain, speedy and efficient remedy" in the California state courts, the Act, by its own terms, is inapplicable.

State judicial and administrative remedies are available only to the party that California deems to be the nominal taxpayer. Despite the fact that it is the foreign parent that is suffering the injury of double taxation, *see* pp. 7-9 *supra*, and that California ignores corporate form in defining an "upstream" unitary business of which the foreign parent is the head, *see* pp. 11-12 *supra*, California chooses not to recognize the parent as a taxpayer. *See Capitol Industries-EMI, Inc. v. Bennett*, 681 F.2d 1107, 1118 (9th Cir.), *cert. denied*, 455 U.S. 943 (1982). Since the foreign parent is not granted taxpayer status, it has no state remedy whatsoever, much less a "plain, speedy and efficient" one. *General Motors Corp. v. California State Board of Equalization*, 815 F.2d 1305, 1308 (9th Cir. 1987) (Kennedy, J.); *Capitol Industries-EMI*, 681 F.2d at 1118.

Consistent with the plain language of the statute, the lower courts have held § 1341 inapplicable where an injured foreign parent company has no state remedy. In *General Motors,* Judge (now Justice) Kennedy stated that "[t]he Tax Injunction Act is no bar to [a party's] suit" where the party had "no remedy in [California] state court". 815 F.2d at 1308.[20] Nor does the Tax Injunction Act preclude an injured party's action for redress simply because another party may be entitled to bring its own action in state court:

> "No authority has been presented for the proposition that a nontaxpayer, without state administrative or judicial remedies, is precluded under Section 1341 from maintaining an action in federal court because it has substantially similar interests and claims as a taxpayer that has such state remedies. A nontaxpayer that has stated a claim with respect to an assessment or collection is entitled to a judicial remedy in which they [sic] can participate as a party." *Capitol Industries-EMI,* 681 F.2d at 1119.

[20] *See also Builders and Developers Corp. v. Manassas Iron and Steel Co.,* 208 F. Supp. 485, 491 (D. Md. 1962); *Alcan I,* 558 F. Supp. at 626 (citing *Alcan Aluminium Ltd. v. Franchise Tax Board,* 539 F. Supp. 512, 514-15 (S.D.N.Y. 1982)). *But cf. Shell Petroleum N.V. v. Graves,* 709 F.2d at 596-97 (affirming the decision of the district court that the policies underlying the Tax Injunction Act compelled a finding that a suit in federal court by the foreign parent company was not ripe where the domestic subsidiaries had an available state court remedy).

Petitioners' argument—that both the Tax Injunction Act and its underlying principle of comity bar an action by a foreign parent where a domestic subsidiary has available a remedy in the state courts, FTB Brief at 41-50—runs contrary to both the weight of the cited precedent and the legislative history of the Act, *see* p. 25 *infra.* Moreover, arguing that the subsidiary should sue on the double taxation claims of the foreign parent company flies in the face of the central tenet of the standing inquiry: the party directly injured and best able to place the issues before the court should be the one to litigate the claim. There is nothing in the Tax Injunction Act or its legislative history to suggest that the Act was intended to create a different standing doctrine for state tax cases.

Since respondents—and other, similarly situated foreign parent companies—have no state remedy, the Tax Injunction Act is inapplicable.[21]

The legislative history of the Tax Injunction Act supports this conclusion. The Act was specifically intended not to foreclose completely an injured party's access to judicial relief. The report of the Senate Judiciary Committee in support of the Act stated that:

> "[T]he bill does not take away any equitable right of the taxpayer or deprive him of his day in court. Specific provision is made that the suit will not be withdrawn from the jurisdiction of the Federal district court except where there is a plain, speedy, and efficient remedy at law or in equity in the courts of the State. *A full hearing and judicial determination of the controversy is assured.*" S. Rep. No. 1035, 75th Cong., 1st Sess. 2 (1937) (emphasis supplied).

See also 81 Cong. Rec. 1416 (1937) (remarks of Sen. Bone). The legislative history is entirely consistent with the judicial interpretation of the Tax Injunction Act as being inapplicable where there is no state forum available for an injured foreign parent company.

Similarly, the principle of comity underlying the Tax Injunction Act does not justify the denial of a federal forum to a foreign parent. The standard governing the application of the principle of comity in an action such as this, challenging the constitutionality of a state tax statute as applied, is the same as the standard governing the application of the Act itself: does the plaintiff have available a plain, speedy and efficient remedy in state court? *See Fair Assessment in Real Estate Ass'n, Inc. v.*

[21] The Court's opinion in *Fair Assessment in Real Estate Ass'n, Inc. v. McNary,* 454 U.S. 100 (1981), is not to the contrary. In that case, the Court held that the nonexhaustion rule of 42 U.S.C. § 1983 did not override the Tax Injunction Act, and that a taxpayer with plain, speedy and adequate state remedies was therefore barred from bringing a federal action under § 1983. *Id.* at 116. As the Seventh Circuit correctly noted, the foreign parent company in an action such as the present one has no state remedy at all, so *Fair Assessment* is inapplicable. 860 F.2d at 699.

McNary, 454 U.S. 100, 116 & n.8 (1981). Where, as here, the foreign parent has *no* remedy in the state courts, abstention would clearly be improper. Congressional intent not to foreclose access to the federal courts where no adequate state relief is available should not be frustrated in the name of comity.

There is an additional reason not to apply the Tax Injunction Act or its underlying principle of comity where, unlike respondents here, the foreign parent is a company of a country which has entered into an FCN Treaty with the United States. As discussed above, FCN Treaties confer specific substantive rights and protections on foreign corporations. *See* pp. 16-18 *supra*. Accompanying those substantive rights are procedural rights of access to American courts, without which the substantive rights could be rendered meaningless. *See, e.g.*, Treaty of Friendship, Commerce and Navigation between the United States of America and the Kingdom of The Netherlands, March 27, 1956, Article V, ¶ 1. Federal statutes, including the Tax Injunction Act, should be construed so as to render them compatible with United States treaties. *See* Restatement (Second) of the Foreign Relations Law of the United States § 145 comment b & reporter's note 1 (1965). Since a foreign parent company cannot assert its treaty claims in a California state court, neither the Tax Injunction Act nor its underlying principle of comity should be applied to deny a foreign parent its only available forum, the federal court.

CONCLUSION

The foreign parent company of an American subsidiary has standing in federal court to challenge, under the Foreign Commerce Clause, the application of a state unitary business tax to the "upstream" combination of the income of the nominal taxpayer subsidiary, its foreign parent and the worldwide subsidiaries and affiliates of that parent. Neither the Tax Injunction Act nor the principle of comity underlying that Act bars such suit.

In any event, due to the special policy considerations applicable to the taxation of foreign companies under the Constitution, and the rights and protections accorded various foreign companies by United States treaties and international conventions, this Court should not decide the case before it on grounds that would foreclose a foreign parent company from raising claims that the "upstream" application of a unitary tax to a foreign parent and its worldwide subsidiaries and affiliates violates United States treaties and general principles of international law.

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APPENDIX

Excerpts from the

Treaty of Friendship, Commerce and Navigation

between the

United States of America

and the

Kingdom of The Netherlands

[8 U.S.T. 2043, T.I.A.S. No. 3942]

Treaty, with protocol and exchange of notes, signed at The Hague March 27, 1956;

Entered into force December 5, 1957.

* * *

Article I

1. Each Party shall at all times accord fair and equitable treatment to the nationals and companies of the other Party, and to their property, enterprises and other interests.

2. Between the territories of the two Parties there shall be, in accordance with the provisions of the present Treaty, freedom of commerce and navigation.

* * *

Article V

1. Nationals and companies of either Party shall be accorded national treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights. It is understood

that companies of either Party not engaged in activities within the territories of the other Party shall enjoy such access therein without any requirement of registration or domestication.

* * *

Article VI

* * *

3. Neither Party shall take unreasonable or discriminatory measures that would impair the rights or interests within its territories of nationals and companies of the other Party, whether in their capital, or in their enterprises and the property thereof, or in the skills, arts or technology which they have supplied.

* * *

Article VII

1. Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other activity for gain (business activities) within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity. Accordingly, such nationals and companies shall be permitted within such territories: *(a)* to establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business; *(b)* either directly or indirectly through one or more intermediaries, to organize companies under the general company laws of such other Party and to acquire the controlling interest in companies of such other Party; *(c)* to control and

manage enterprises which they have established or acquired. Moreover, enterprises which they control, whether in the form of individual proprietorships, companies or otherwise, shall in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other Party.

* * *

Article XI

1. Nationals of either Party residing within the territories of the other Party, and nationals and companies of either Party engaged in trade or other gainful pursuit or in scientific, educational, religious or philanthropic activities within the territories of the other Party, shall not be subject to the payment of taxes, fees or charges imposed upon or applied to income, capital, transactions, activities or any other object, or to requirements with respect to the levy and collection thereof, within the territories of such other Party, more burdensome than those borne by nationals and companies of such other Party.

2. With respect to nationals of either Party who are neither resident nor engaged in trade or other gainful pursuit within the territories of the other Party, and with respect to companies of either Party which are not engaged in trade or other gainful pursuit within the territories of the other Party, it shall be the aim of such other Party to apply in general the principle set forth in paragraph 1 of the present Article.

3. Nationals and companies of either Party shall in no case be subject, within the territories of the other Party, to the payment of taxes, fees or charges imposed upon or applied to income, capital, transactions, activities or any other object, or to requirements with respect to the levy and collection thereof, more burdensome than those borne by nationals, residents and companies of any third country.

4. In the case of companies and of non-resident nationals of either Party engaged in trade or other gainful pursuit within

the territories of the other Party, such other Party shall not impose or apply any tax, fee or charge upon any income, capital or other basis in excess of that reasonably allocable or apportionable to its territories, nor grant deductions and exemptions less than those reasonably allocable or apportionable to its territories. A comparable rule shall apply also in the case of companies organized and operated exclusively for scientific, educational, religious or philanthropic purposes.

5. Each Party reserves the right to: *(a)* extend specific tax advantages on the basis of reciprocity; *(b)* accord special tax advantages by virtue of agreements for the avoidance of double taxation or the mutual protection of revenue; and *(c)* accord to its own nationals and to residents of contiguous countries more favorable exemptions of a personal nature with respect to income and inheritance taxes than are accorded to other non-resident persons.

* * *

Article XXIII

1. The term "national treatment" means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party.

2. The term "most-favored-nation treatment" means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of any third country.

3. As used in the present Treaty, the term "companies" means corporations, partnerships, companies, foundations, associations, and other legal entities or juridical persons, whether or not with limited liability and whether or not for pecuniary profit. Companies constituted under the applicable laws and regulations within the territories of either Party shall

be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party.

4. National treatment accorded under the provisions of the present Treaty to companies shall: *(a)* as regards companies of the Kingdom of the Netherlands, in any State, Territory or possession of the United States of America, be the treatment accorded therein to companies created or organized in other States, Territories and possessions of the United States of America; and *(b)* as regards companies of the United States of America, in any Part of the Kingdom of the Netherlands, be the treatment accorded therein to companies created or organized in any other Part of the Kingdom. Furthermore, in any Part of the Kingdom of the Netherlands outside Europe, national treatment accorded to nationals of the United States of America shall be the treatment accorded in such Part to Netherlands nationals not born in that Part.

* * *